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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 926

JOSEPH S. CHINN

Petitioner

v.

IDA V. CHINN

Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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In The

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October Term, 1957

No.

Joseph S. Chinn

Petitioner

v.

Ida V. Chinn

Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled cause on January 16, 1958.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported (R. 27, infra, 3a). The District Court entered an order granting judgment for absolute divorce, awarding support for a minor child and adjudicating property rights (R. 9, infra, 1a).

JURISDICTION

The judgment of the Court of Appeals was entered on January 16, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

Husband and wife are owners of two pieces of property as tenants by the entirety. In granting the wife a divorce, the District Court awarded the more valuable property to the wife and minor child of the parties as joint tenants. The other property, of lesser value, was awarded to the husband in fee simple, and he was ordered to make monthly payments for support of the minor child placed in the wife's custody.

The authority and jurisdiction of the District Court when it had divorce jurisdiction,[1] was limited by statute to support of minor children during their minority. It did not extend to endowment in lieu of or to supplement support. In the absence of any written property agreement between the parties which complied with the Statute of Frauds,[2] and in the absence of any evidence in the record showing mutual assent of the parties to the order of the court, the question presented is:

1. Whether a person is deprived of his property without due process of law by the District Court endowing a minor child with his property in a divorce proceeding, without his assent or written agreement, and which endowment exceeds the statutory authority of the court.

STATUTES INVOLVED

Title 16-409 D.C. Code (1951):

> Upon the entry of a final decree of annulment or divorce a vinculo, in the absence of a valid antenuptial or post nuptial agreement in relation thereto, all property rights of the parties in joint tenancy or tenancy by the entirety shall stand dissolved and the

[1] Jurisdiction transferred to the Municipal Court for the District of Columbia, Title 11-758 D.C.Code (1951), 70 Stat. 111, ch. 204, § 101.

[2] Title 12-302, D.C.Code (1951).

court, in the same proceeding in which such decree is entered, shall have power and jurisdiction to award such property to the one lawfully entitled thereto or to apportion the same in such manner as shall seem equitable, just, and reasonable. (Mar. 3, 1901, ch. 854, § 974a, as added Aug. 7, 1935, 49 Stat. 540, ch. 453, § 3.)

Title 16-411 D.C.Code (1951):

When a divorce is granted to the wife, the court shall have authority to decree her permanent alimony sufficient for her support and that of any minor children whom the court may assign to her care, and to secure and enforce the payment of said alimony in the manner before mentioned, and may, if it shall seem fit, retain to the wife her right of dower in the husband's estate. (Mar. 3, 1901, 31 Stat. 1346, ch. 854, § 976.)

STATEMENT

The respondent wife filed suit in the United States District Court for the District of Columbia asking for an absolute divorce, custody of a minor child, support money for herself and child, and her share of real property owned as tenants by the entirety with the petitioner husband (R. 5-6). The respondent alleged in her sworn complaint that one property, 25-45th Street, N.E., had an approximate market value of $6,500, and another property at 209-44th Street, N. E., had an approximate market value of $15,000 (R. 6). Petitioner did not dispute the values alleged, and, so far as the record on appeal indicates, constituted the guide utilized by the trial judge in valuation and awarding of the property.

The District Court (R. 9) awarded the 44th Street property, valued by respondent at $15,000, to the respondent and the minor child of the parties as joint tenants, and the 45th Street property, valued at $6,500 by respondent, to petitioner in fee simple, and directed petitioner to pay $15.00 monthly for support of the child with custody in respondent.

No written ante or post nuptial agreement of any nature was entered into by petitioner and respondent. On appeal petitioner claimed error in awarding real property to the minor child. The respondent argued by brief (p. 8) that the parties agreed to the disposition of the property as made by the court; that the agreement was made in chambers and open court as evidenced by the following (R. 26):

> THE COURT: I will see counsel in chambers.
> Thereupon, at 3:30 o'clock p.m. the trial was recessed until October 17, 1956, at 10 o'clock a.m.
> THE COURT: I find for the plaintiff. The big house goes to the wife and the other house to the husband, and she will have custody of the child with right of visitation by the father; and $15 maintenance per month.
> MR. MORGAN: You didn't mention the fact that the big house is going jointly to the child and mother.
> THE COURT: Yes.
>
> • • • •
>
> MR. MORGAN: If your Honor please, I think the order should provide, because the child is not strictly a party to the proceeding, that Mr. and Mrs. Chinn will deed to a straw party the big house and back to the daughter.
> THE COURT: I am not going into details.
> MR. MORGAN: We will work that out because otherwise you can't create a joint tenancy.
> THE COURT: All right.
> (Thereupon the trial was concluded.)

The resistance to or lack of agreement by petitioner is indicated in the testimony of a witness for respondent (R. 25):

> Q. Did he say anything to you about whether or not they had reached any sort of settlement or understanding?
> A. No, as far as that is concerned he said he was through.
> Q. When you talked with him the second time what did he say?

A. The second time I talked with him it was practically on the same line that there wasn't no settlement at all between them, they just couldn't make it.

The award was affirmed by the court of appeals on the premise that a property agreement approved by the parties and their counsel had been incorporated by the District court into the final judgment (R. 27, infra, 2a).

REASONS FOR GRANTING THE WRIT

There is no question of the inherent and statutory power of the courts to make orders for the support of children during minority.[3] Statutory authority to award community property incidental to divorce is quite another matter. The United States Court of Appeals for the District of Columbia, *Wheeler* v. *Wheeler, 88 U.S.App.D.C. 193, 188 F.2d 31,* considered property rights as between husband and wife saying:

> Turning from the statutory language to general principles of equity jurisprudence, we find that the question of the court's power over the husband's real property often has arisen in other jurisdictions. And the courts have generally agreed that, absent more explicit statutory authorization, a statute empowering the court to grant alimony does not give the court power to award the husband's property to the wife in lieu of, or in addition to, the sum of money allowed for her support; such action has been considered to be beyond the court's jurisdiction. See cases collected in 133 A.L.R. 860, et seq. (1941); 2 Nelson, Divorce and Annulment § 14.104 (2d ed. 1945). This is so even where the court's powers to grant alimony in connection with an absolute divorce are not exclusively statutory but are also derived from the court's general equity jurisdiction.

In a subsequent opinion the court of appeals held the

[3] Emrich v. McNeil, 75 App.D.C. 307, 126 F.2d 841, 146 ALR 1146.

right to support is not the right to endowment.[4] These opinions are in harmony with state decisions where, obviously, the majority of such determinations are found because of divorce jurisdiction.

Emery v. *Emery, 104 Kan. 679, 180 P. 543,* appears widely cited on the question of awarding property to minor children as an incidence of divorce. The court held an award of property to the minor children was void, stating.

> The power even of a court of general jurisdiction does not extend to taking property from a party to an action and giving it to a stranger. Whatever power the district court has in a divorce suit to afford protection to the children of the parties is derived from the statute quoted, and is limited to making provision for their support and education *during their minority.*

The rule is followed in other jurisdictions, among others, Iowa and Ohio.[5] The opinion of the appellate court in this case and prior decisions as hereinbefore cited, indicate harmony in opinion of the law with that expressed in the states, but the appellate court below would allow the award to the child to stand in this instance as an exception to the rule, viz., incorporation of a property agreement between the parties and their counsel in the decree of the court.

The controlling statute, Title 16-409 D.C. Code, supra, requires a VALID ANTENUPTIAL OR POSTNUPTIAL AGREEMENT, otherwise the court is restricted in power and authority to division of the realty between the legal and equitable owners. It seems unnecessary to state that a valid husband and wife real property agreement must have all the attributes of any contract, i.e., consideration,

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[4] Keleher v. Keleher, 89 U.S.App.D.C. 266, 192 F.2d 601.

[5] Thiessen v. Moore, 137 N.E. 906, 105 Ohio 401; Davidson v. Davidson, 165 N.W. 44.

absence of fraud or coercion, in writing and signed as required by the statute of frauds. No written separation or property agreement was entered into by petitioner and respondent. The quoted portions of the trial testimony (R. 25, supra, p. 4, 5) clearly demonstrate resistance of petitioner to agreement or settlement. That portion of the trial proceedings (R. 26, supra, 4) relied upon by respondent and the court below to show existence of a property agreement between the parties is *entirely devoid of anything upon which to predicate such a finding.* At most the record shows:

1. Opposing counsel had a discussion of some nature in chambers.
2. Counsel appeared aware of the trial court's intentions with respect to disposition of the joint property before announcement in open court.

The record fails to show that petitioner acquiesced in such a property distribution prior to or after pronouncement by the court. Consistent with the absence of such a showing is the complete absence of any indication by the trial court in its oral announcement that his decision was in any way predicated upon agreement or assent of either party. Neither does the judgment for absolute divorce (R. 9, infra, 1a) contain any indication whatever that the property award was predicated upon agreement or assent of the parties, or that any agreement of the parties was incorporated therein. To the contrary, the divorce decree speaks solely for and in behalf of the court. Petitioner's disagreement with the court's judgment was quickly manifest by an appeal claiming error in awarding of the property.

Title 16-409, D.C.Code, supra, requires apportionment of husband and wife joint tenancies in such manner as shall be equitable, just and reasonable. The court clearly abused the statute by awarding petitioner the property valued at $6,500 and otherwise disposing of the property

valued at $15,000. In any event, the arbitrary and extra legal assumption of power and authority by the district court in awarding petitioner's property to the minor child as an endowment without valid agreement thereto constitutes a taking of property without due process and in derogation of the laws of descent.

Since the appendices herein (R. 1-26) constitute the only record upon which the appellate court had to predicate its opinion that the trial court had incorporated a mutual agreement into the judgment, and there is no evidence in the appendices showing such an agreement, petitioner respectfully states the judgment herein represents a radical departure from judicial processes, in conflict with state decisions, and a denial of due process sufficiently serious to warrant the attention of this Honorable Court.

CONCLUSION

For the reasons stated, your petitioner believes his petition for a writ of certiorari should be granted.

Respectfully submitted,

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Washington, D.C.
Of Counsel

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 804-56

IDA CHINN
209 44th Street N.E.
Washington, D.C.
Plaintiff

vs

JOSEPH S. CHINN
209 44th Street N.E.
Washington, D.C.
Defendant

Filed December 3, 1956

JUDGMENT FOR ABSOLUTE DIVORCE

This cause coming on to be heard, upon the complaint and answer, the testimony taken in open Court, argument of counsel, and it appearing to the Court from consideration thereof that the plaintiff is a citizen of the United States and has been a resident of the District of Columbia for more than two years next preceding the filing of this action; that the plaintiff and defendant were married on August 30, 1940, in Upper Marlboro, Maryland; that the parties have one child, who is in the joint custody of the plaintiff and defendant; that the plaintiff and defendant voluntarily separated on January 15, 1951; said separation has been continuous without cohabitation to this date, it is by the Court this 3rd day of December, 1956

ORDERED ADJUDGED AND DECREED, that the plaintiff be and she is hereby granted an absolute divorce from the defendant on the ground of five years voluntary separation, continuously, and uninterrupted without

cohabitation to the present date; provided that this judgment shall not become effective until the expiration of the time allowed for taking an appeal, nor until a final disposition of any such appeal, nor in any event until the expiration of six months from the date hereof.

It is further ORDERED, ADJUDGED AND DECREED, that the custody of the minor child of the parties hereto be awarded to the plaintiff and that the defendant pay to the plaintiff the sum of $15.00 a month for support of said child; said payments to be made on the first of each month beginning January 1, 1957; that the defendant is hereby given the right of visitation at reasonable times.

It is further ORDERED ADJUDGED AND DECREED, that the property owned by the parties hereto, as tenants by the entireties, located at 209 44th Street, Northeast is hereby awarded and conveyed to the plaintiff and Carol Chinn, the minor child of the parties hereto as joint tenants and that the property owned by the parties as tenants by the entireties, located at 25 45th Street, Northeast, be and is hereby awarded and conveyed to the defendant in fee simple. Plaintiff may not convey her interest in said property for six years without leave of Court.

/s/ Edward M. Curran
Judge

Seen

/s/ Jo V. Morgan, Jr.
Attorney for Defendant

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,881

JOSEPH S. CHINN, APPELLANT

v.

IDA V. CHINN, APPELLEE

Appeal from the United States District Court
for the District of Columbia

Decided January 16, 1958

Mr. Everett L. Edmond for appellant.

Mr. Belford V. Lawson, Jr., with whom *Miss Marjorie A. McKenzie* was on the brief, for appellee.

Before PRETTYMAN, WILBUR K. MILLER and BASTIAN, Circuit Judges.

PER CURIAM: Appellant seeks to reverse a judgment for absolute divorce granted on the ground of voluntary separation without cohabitation for a period of five years. We find no error.

Appellant also complains that the District Court erroneously disposed of real estate jointly owned by the parties. The court incorporated into the final judgment a property agreement approved by the parties and their counsel. This the court had the right to do.

Affirmed.

Filed Jan. 16, 1958. Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,881

January Term, 1958.

C. A. 251-53

JOSEPH S. CHINN, APPELLANT

v.

IDA V. CHINN, APPELLEE

Appeal from the United States District Court for the District of Columbia.

Before: PRETTYMAN, WILBUR K. MILLER and BASTIAN, Circuit Judges.

JUDGMENT

THIS CAUSE came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

It is further ORDERED by the Court that appellee herein recover from appellant her taxable costs on this appeal and have execution therefor.

Dated: January 16, 1958.

Per Curiam.